



## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R03-OAR-2009-0882; FRL- 9738-1]

#### **Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Streamlining Amendments to the Plan Approval Regulations**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is granting limited approval to a State Implementation Plan (SIP) revision submitted by the Pennsylvania Department of Environmental Protection (PADEP) on April 14, 2009. The revision pertains to PADEP's plan approval requirements for the construction, modification, and operation of sources, and is primarily intended to streamline the process for minor permitting actions. This action is being taken under the Clean Air Act (CAA).

**DATES:** This final rule is effective on [insert date 30 days from date of publication].

**ADDRESSES:** EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2009-0882. All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) website. Although listed in the electronic docket, some information is not publicly available, i.e., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through [www.regulations.gov](http://www.regulations.gov) or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State

submittal are available at the Pennsylvania Department of Environmental Protection, Bureau of Air Quality Control, P.O. Box 8468, 400 Market Street, Harrisburg, Pennsylvania 17105.

**FOR FURTHER INFORMATION CONTACT:** David Talley, (215) 814-2117, or by e-mail at [talley.david@epa.gov](mailto:talley.david@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

Throughout this document, whenever “we,” “us,” or “our” is used, we mean EPA. On April 12, 2012 (77 FR 21908), EPA published a notice of proposed rulemaking (NPR) for the Commonwealth of Pennsylvania. The NPR proposed approval of amendments to the plan approval requirements for the construction, modification, reactivation, and operation of sources under 25 Pa. Code chapter 127. The formal SIP revision was submitted by PADEP on April 14, 2009.

### **II. Summary of SIP Revision**

The primary purpose of the amendments is to streamline the permitting process by eliminating some of the administrative burden and costs associated with processing minor permitting actions, while preserving the right of the public to review and comment on those proposed actions. The proposed amendments generally affect five regulations: section 127.12b, pertaining to “shakedown” periods for new or modified sources; section 127.12d, pertaining to completeness determinations; sections 127.44 and 127.45, pertaining to public notice requirements; and section 127.48, pertaining to conferences and hearings. The specific requirements of the SIP revision and the rationale for EPA’s proposed action are explained in the NPR and will not be restated here.

### **III. EPA's Response to Comments Received on the Proposed Action**

EPA received a single set of comments on its April 12, 2012 proposed action to approve revisions to the Pennsylvania SIP. These comments, provided by the Clean Air Council, (hereinafter referred to as "the Commenter"), raised concerns with regard to EPA's April 12, 2012 proposed action. A full set of these comments is provided in the docket for today's final action. A summary of the comments and EPA's responses are provided below.

Generally, the Commenter raises three areas of concern. First, the Commenter asserts that the proposal to increase the duration of "shakedown period" extensions from 120 days to 180 days is inappropriate. Second, the Commenter asserts that the addition of the completeness determination requirements adds to PADEP's permitting burden, and together with the other contested revisions, "...increases the burden on the public contrary to the stated purpose of the Clean Air Act..." (*See*, Comments at 3). Third, the Commenter raises several specific concerns regarding the proposed revisions to the public participation requirements under 25 Pa. Code section 127. EPA's response to these comments is below.

*Comment 1:* The Commenter notes that PADEP's previously approved regulations allow a 180-day shakedown period, with provisions for obtaining a 120-day extension. The Commenter further asserts that PADEP has not provided any justification as to why the existing 120-day extension period should be expanded to 180 days, and that, in the absence of such justification, the proposed longer extension period is "...both unnecessary and improper," (*See*, Comments at 2).

*Response 1:* 25 Pa. Code section 127.12b outlines the terms and conditions which must be

included in each plan approval. Under section 127.12b(c), each plan approval “...must authorize temporary operation to facilitate shakedown of sources and air cleaning devices, to permit operations pending issuance of a permit under Subchapter F (relating to operating permit requirements) or Subchapter G (relating to Title V operating permits) or to permit the evaluation of the air contamination aspects of the source.” The currently approved regulations already allow for a 120-day extension of this temporary operating authorization. EPA disagrees with the Commenter’s assertion that allowing a longer, 180-day extension is improper, and we leave to PADEP’s discretion the issue of whether it is necessary. CAA section 110(k)(3) requires the Administrator to approve a SIP submittal “...if it meets all of the applicable requirements of this chapter.” We cannot identify, nor did the Commenter point to any CAA requirement or provision of its implementing regulations which is contrary to PADEP’s proposed expansion of the temporary operating authorization period. Furthermore, we note that 25 Pa. Code section 127.12b requires each plan approval to contain all applicable CAA requirements, including monitoring, recordkeeping and reporting, and prohibits PADEP from approving or extending the temporary authorization period in any instance which would circumvent the requirements of 25 Pa. Code section 127. Therefore, we are approving the revisions to 25 Pa. Code 127.12b as submitted.

*Comment 2:* Although acknowledging that the proposed addition of the completeness determination requirements of 25 Pa. Code section 127.12d complies with the CAA, the Commenter asserts that, “It defies common understanding of fairness to push burdens away from the booming private industry while at the same time increasing the burden on government, especially when PADEP is facing budget cuts” (*See, Comments at 3*).

*Response 2:* EPA disagrees that the addition of completeness determinations imposes an undue burden on permitting authorities. On the contrary, clearly defining what is required of both the applicant and the permitting authority (PADEP in this case), as well as establishing deadlines on both parties eliminates potentially open ended, back-and-forth correspondence between the applicant and PADEP that draws the permitting process out unnecessarily. Such a situation is much more burdensome on a permitting authority than a requirement for completeness determinations. In any event, the point is moot. The completeness determination provision proposed by PADEP is not only compliant with the CAA, it is required by 40 CFR 51.166(q)(1). We are therefore approving the revisions as submitted.

*Comment 3:* The third area of concern raised by the Commenter relates to the proposed revisions to the public participation requirements for plan approvals. The specific provisions with which the Commenter takes issue are discussed in detail as follows:

First, the Commenter asserts that the proposed revision to 25 Pa. Code 127.44, specifically the elimination of the receipt of application notice for minor permitting actions, "... would significantly decrease the public's awareness of the permitting activity in their own communities and consequently diminish the public's ability to provide meaningful input into the permitting process," (*See*, Comments at 3). Second, the Commenter asserts that the elimination of the newspaper publication requirement for minor permitting actions in favor of publication in the *Pennsylvania Bulletin* under the proposed revision to section 127.44 is contrary to 40 CFR sections 51.166(q), 51.161(b)(3), and 70.7(h), arguing that because the *Pennsylvania Bulletin* is a "highly esoteric publication with very limited and specialized readership" (*See*, Comments at 4), it fails to meet the CAA's "prominent advertisement" requirements. Third, the Commenter

asserts that eliminating the requirement for notice to be sent to affected states is contrary to 40 CFR sections 70.7(h)(3), 70.8, and 51.166(q)(2)(iv). Fourth, the Commenter asserts that the proposed revisions to section 127.45, related to the required contents of the public notices, are contrary to 40 CFR section 51.161(a) because the revised provisions do not include the requirement to disclose the proposed emissions limitations, PADEP's analysis of the applicant's proposal, and the project's impact on ambient air quality (*See*, Comments at 7). Finally, the Commenter asserts that section 127.48 is contrary to 40 CFR 51.166(q)(iii) and (v) because it gives PADEP too much discretion in determining when to hold conferences and public hearings.

*Response 3:* Generally, the proposed revisions to the public notice requirements pertain to Pennsylvania's minor NSR program. In contrast to the considerable requirements prescribed for major NSR, the CAA, at section 110(a)(2)(C), addresses minor source programs only by requiring that each SIP include a program that provides for "...regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that [NAAQS] are achieved..." The implementing regulations for minor NSR are at 40 CFR sections 51.160-51.164. In sum, states have considerable discretion with regard to developing their minor NSR programs.

With regard to the elimination of the receipt of application notice, the Commenter is incorrect in the assertion that the previously approved version of the Pennsylvania SIP requires both a notice of receipt and a notice of intent to issue. Only one notice, a notice of intent to take action (issue/deny) was required by the previously approved version of 25 Pa. Code 127.44(a). PADEP was, as a matter of policy, issuing two notices. It was never a requirement, and it is within PADEP's discretion to stop that practice. The revisions to section 127.44(a) are consistent with

the requirements of 40 CFR section 51.161(a).

The Commenter's assertion that the elimination of the newspaper publication requirement for minor permitting actions in favor of publication in the *Pennsylvania Bulletin* under the proposed revision to section 127.44 is contrary to 40 CFR sections 51.166(q), 51.161(b)(3), and 70.7(h) is also incorrect. First, the types of actions that are subject to the revised requirements of 25 Pa. Code 127.44(a) are not subject to the major NSR requirements of 40 CFR 51.166(q). With regard to section 70.7(h), in certain circumstances, Pennsylvania operates a "merged" permit program in which a plan approval is both an NSR and a title V action, and the requirements of the plan approval are brought into the facility's title V permit as an administrative amendment with no additional public notice. In such instances, all of the public notice requirements of part 70, including the newspaper requirement of section 70.7(h) are applicable. It is unclear how frequently this situation occurs in the types of minor facilities that are subject to the proposed revisions to 25 Pa. Code 127.44. Nevertheless, this is a title V implementation issue, and does not affect the approvability of the proposed revisions to Pennsylvania's NSR SIP. Furthermore, we disagree that publication in the *Pa. Bulletin* fails to meet the "prominent advertisement" requirements of 40 CFR 51.161(b)(3). EPA has repeatedly recognized that the prominent advertisement requirements of section 51.161(b)(3) are media neutral, and that state programs may meet the requirement with alternative methods, provided that it is reasonable to conclude that the public would have "ready and routine access to any alternative publishing venues," (*See*, April 17, 2012, Janet McCabe Memo to Regional Administrators entitled, "Minor New Source Review Public Notice Requirements under 40 CFR 51.161(b)(3)", available at <http://www.epa.gov/region07/air/nsr/nsrmemos/pubnot.pdf>). We believe publication in the *Pa. Bulletin* meets this standard.

With regard to the Commenter's assertion that eliminating the requirement for notice to be sent to affected states is contrary to 40 CFR sections 70.7(h)(3), 70.8, and 51.166(q)(2)(iv), as we stated above, the types of actions that are subject to the proposed revised requirements of 25 Pa. Code 127.44(a) are not subject to the major NSR requirements of 40 CFR section 51.166. The applicable regulations of 40 CFR sections 51.160-51.164 contain no such notice requirement. As discussed above, the applicability of the title V requirements of part 70 is dependent on whether the specific plan approval is being processed as a "merged" permit, and is an implementation issue that does not impact the approvability of the proposed SIP revision.

EPA agrees with the Commenter's assertion that the proposed revisions to 25 Pa. Code 127.45 fall short of what is required by 40 CFR 51.161. However, as we discussed in our proposal, we believe that to some extent, the intent of section 51.161(a) was met in 25 Pa. Code sections 127.45(a)(3) and (4), which contain the requirements for what must be included in the public notice. These sections require a description of the proposed construction or modification, the control technology being installed, the conditions in the proposed permit (with reference to applicable federal requirements), and the type and quantity of air contaminants being emitted. Nevertheless, the agency analysis required by 40 CFR 51.161(a) is not explicitly required in the proposed SIP revision, nor do the regulations of sections 127.44 and 127.45 require that the agency's analysis be made available for public inspection in at least one location, in accordance with 40 CFR 51.161(b)(1). Section 127.44(f)(1) requires only that the application be made available. This is the basis for granting limited approval. In order to receive full approval, PADEP must adopt regulations that explicitly require that the agency's analysis be included in the materials made available to the public, and that the materials be made available for public



inspection in at least one location.

Additionally, the Commenter asserts that the proposed revisions have lead to inadequate information being provided in the notices of receipt and intent to issue, thus limiting the public's ability to participate meaningfully in the permitting process (*See*, Comments at 7). The Commenter further asserts that not only should the application materials and the agency's analysis be provided to the public, but that the proposed permit itself should also be provided. There is no requirement in section 51.161 that the proposed permit be made public. Nevertheless, EPA agrees that the generic, boilerplate language cited by the Commenter falls short of the intent of section 51.161 (*See*, Comments at 7-8). However, this is an implementation issue which is outside of the scope of the SIP revision process. Once PADEP submits regulations which correct the deficiencies leading to our limited approval, the regulations at 25 Pa. Code section 127.45 will be fully approvable on their face.

Finally, EPA disagrees with the Commenter's assertion that 25 Pa. Code 127.48 is contrary to 40 CFR 51.166(q)(iii) and (v) because it gives PADEP too much discretion in determining when to hold conferences and public hearings. The requirements of section 127.48 apply not to routine public hearings held in the course of the public notice process, but to hearings held as a result of an official protest having been filed in accordance with section 127.46. There are no public hearing requirements in 40 CFR section 51.161 for minor NSR actions. Additionally, we note that Pennsylvania has met the plan requirements of 40 CFR section 51.166 by incorporating by reference in their entirety the federal regulations at 40 CFR section 52.21. Therefore, the applicable requirements are not under section 51.166(q), but rather are under section 52.21(q). Section 52.21(q) requires that the applicable procedures of 40 CFR section 124 be followed in

the processing of applications. According to section 124.12(a), “The Director shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest in a draft permit(s).” It is clear that there is some discretion afforded to the permitting authority in determining when a public hearing should be held.

For the reasons discussed above, EPA believes that with the exception of the noted deficiencies, PADEP’s proposed SIP revision meets all applicable CAA requirements, and that a limited approval is warranted.

#### **IV. Final Action**

EPA is granting limited approval of the submitted amendments to 25 Pa. Code chapter 127 as a revision to the Pennsylvania SIP.

#### **V. Statutory and Executive Order Reviews**

##### **A. General Requirements**

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA’s role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);

- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

## **B. Submission to Congress and the Comptroller General**

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

## **C. Petitions for Judicial Review**

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [Insert date 60 days from date of publication of this document in the Federal Register]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action.

This action regarding streamlining amendments to Pennsylvania's plan approval process may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: September 21, 2012.

W. C. Early,  
Acting Regional Administrator,  
Region III.

40 CFR part 52 is amended as follows:

PART 52 - [AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart NN--Pennsylvania

2. In § 52.2020, the table in paragraph (c)(1) is amended by:

a. Revising the entry for Title 25, Section 127.12b.

b. Adding an entry for Title 25, Section 127.12d after the existing entry for Section 127.12c.

c. Revising the entries for Sections 127.44, 127.45, and 127.48.

The amendments read as follows:

§ 52.2020                      Identification of plan.

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(c) \*\*\*

(1) \*\*\*

| State citation  | Title/subject                      | State effective date | EPA approval date   | Additional explanation/<br>§ 52.2063 citation |
|---|------------------------------------|----------------------|---|---|
| <b>Title 25-- Environmental Protection</b>  |                                    |                      |   |   |
| <b>Article III--Air Resources</b>   |                                    |                      |   |   |
| *   *   *   *   *   *   *   |                                    |                      |   |   |
| <b>Chapter 127- Construction, Modification, Reactivation and Operation of Sources</b> |                                    |                      |   |   |
| *   *   *   *   *   *   *   |                                    |                      |   |   |
| <b>Subchapter B - Plan Approval Requirements</b>                                      |                                    |                      |   |   |
| *   *   *   *   *   *   *   |                                    |                      |   |   |
| Section 127.12b   | Plan Approval Terms and Conditions | 5/24/08              | [Insert Federal Register publication date] [Insert page number where the document begins] | Revised; limited approval                     |
|   |                                    |                      |   |   |

| State citation  | Title/subject              | State effective date | EPA approval date   | Additional explanation/<br>§ 52.2063 citation |
|-----------------|----------------------------|----------------------|---|---|
| * * * *         | * * *                      |                      |   |   |
| Section 127.12d | Completeness Determination | 5/24/08              | <u>[Insert Federal Register publication date]</u> <u>[Insert page number where the document begins]</u> | Added; limited approval                       |
| * * * *         | * * *                      |                      |   |   |
| Section 127.44  | Public Notice              | 5/24/08              | <u>[Insert Federal Register publication date]</u> <u>[Insert page number where the document begins]</u> | Revised; limited approval                     |
| Section 127.45  | Contents of Notice         | 5/24/08              | <u>[Insert Federal Register publication date]</u> <u>[Insert page number where the document begins]</u> | Revised; limited approval                     |
| * * * *         | * * *                      |                      |   |   |
| Section 127.48  | Conferences and Hearings   | 5/24/08              | <u>[Insert Federal Register publication date]</u> <u>[Insert page number where the document begins]</u> | Revised; limited approval                     |
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[FR Doc. 2012-24524 Filed 10/04/2012 at 8:45 am; Publication Date: 10/05/2012]